Against the Grain

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Charleston Conference Call for Papers

Editor

to include freelancers' material in their online offerings)? If the trump card is access, then librarians should unite against *Tasini* and the National Writers' Union – no reasonable argument could hold that a *Tasini* victory would mean greater public access to information. If the trump card is workers' rights, then librarians should unite against the *New York Times*.

What to do? The ALA's Washington office reports that while the suit was being heard in the lower courts, "having interests on both sides of the case, and having been approached by the lawyers of each side, ALA and ARL [Association of Research Libraries] chose to remain neutral."[1] But when the case found its way to the Supreme Court, neutrality was no longer feasible; given the potentially significant impact of a ruling in either direction, the library profession needed to make its voice heard. "After much discussion," says the ALA, "both [the ALA and ARL] boards decided that support for the freelance writers was consonant with association principles and positions."[2]

This position is worth examining. A decision in favor of *Tasini* would almost certainly have the ultimate effect of reducing the amount of information available to the public, as newspapers and online databases scrambled to ensure compliance. It also represents a strengthening of authors' rights under copyright law – not a goal that is generally at the top of the ALA's legislative agenda. Recognizing this paradox, ALA explains this way:

> The library community believes that copyright exists for the public good. Its fundamental purpose, according to the ARL Statement of Principles on Intellectual Property, "is to serve the public interest by encouraging the advancement of knowledge through a system of exclusive but limited rights for authors and copyrights owners." ARL and ALA support the right of an author to decide whether to retain, modify, or assign copyright on a piece that he or she has created. Libraries also recognize and respect the public interest in having access to the work produced by the freelancers.[3]

In other words, the ALA sided with *Tasini* on the grounds that it is an author's right to decide whether or not to reassign copyright in his or her work. But this statement ignores the basic premise of the *Tasini* case – the legal question was not whether an author has the right to reassign copyright in his own work (that right is clearly established in current law and precedent). The question was whether, having sold to a publisher the right to publish a particular work in a print newspaper or magazine, the author retains the exclusive right to republish that work in an online database. The publishers argued that online publication amounted to an allowable "revision," while the writers argued that the version in a database constituted a "derivative work." For the Supreme Court justices, the argument seemed to hinge on the question of which work was being replicated in the database – the individual article or the newspaper or magazine.[4]

A decision in either direction would have been understandable. On the one hand, an article reproduced exactly in electronic format is clearly not a "derivative work," any more than a typed transciption of a magazine article is. Rather, it's the same work presented in a different format. On the other hand, a database of *New York Times* articles is equally clearly not just a re-creation of the *New York Times*. Rather, it's a database of articles, and is essentially granular in nature; the articles are presented as individual pieces of writing, completely divorced from the context of the specific newspaper issue in which they originally appeared. So the Court's 7-2 decision in favor of *Tasini*, while not uncontroversial, is also by no means scandalous or especially surprising.

What remains to be seen now is whether the doomsday scenarios of the publishers will come to pass. At this writing, in November of 2001, there are scattered reports of content suddenly disappearing from online products, but nothing like the catastrophic outbreak of database leprosy that was predicted in some quarters. To a large degree, future problems have been circumvented by publishers' quick adoption (as soon as the *Tasini* suit was filed) of copyright agreements that require authors to assign all publication rights in all conceivable formats to the publisher in perpetuity.

As both a freelance writer and a librarian, I find myself neither thrilled nor especially dismayed by the verdict. The Supreme Court may have made its decision, but for me, the jury in the *Tasini* case is still out.

Endnotes

1. ALA Washington Office, "Libraries and the *Tasini* Case." *http://www.ala.org/washoff/tasinisupport.html.*
2. Ibid.
3. Ibid.
4. Reid, Calvin. *Publishers Weekly* v. 248 no14 (Apr. 2 2001) p. 10.

2002 Charleston Conference - Issues in Book and Serial Acquisition

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Thursday-Saturday, October 31 - November 2, 2002 — Main Conference

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